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Supreme Court of the United States

OCTOBER TERM, 1985

JIM BACA, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO; STATE OF NEW MEXICO, EX. REL. STATE HIGHWAY DEPARTMENT OF THE STATE OF NEW MEXICO; AND KENT NOWLIN CONSTRUCTION COMPANY

Petitioners,

v.

DAVID ROE AND SHEILA ROE, BUENA VIDA, INC., AND UNITED CONTINENTAL NEW MEXICO, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

WALTER E. DIERCKS
Counsel of Record
ERIC M. RUBIN
ERIE F. SAMPSON
RUBIN, WINSTON & DIERCKS
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870
Attorneys for Petitioners

Of Counsel:
ARTHUR J. WASKEY
General Counsel, Commissioner of Public Lands
BILL R. GARCIA
Special Assistant Attorneys General of the State of New Mexico, Attorneys for Jim Baca, Commissioner of Public Lands of the State of New Mexico

REESE C. JONES
Special Assistant Attorney General Attorney for State Highway Department of the State of New Mexico

KENNETH C. DOWNES
Attorney for Kent Nowlin Construction Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Whether the mineral reservation included in a New Mexico Patent for State Land pursuant to the Jones Act, 42 U.S.C. 870, which reserves to New Mexico "all minerals of whatsoever kind", includes gravel deposits susceptible of commercial exploitation.

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PETITION FOR A WRIT CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Jim Baca, Commissioner of Public Lands of the State of New Mexico, the State Highway Department of the State of New Mexico and Kent Nowlin Construction Company petition for a writ of certiorari to review a decision of the Supreme Court of the State of New Mexico in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico (App. A, *infra*, 1a to 10a) is reported at 710 P.2d 84 (N.M. 1985). The order of the Supreme Court of New Mexico denying motions for rehearing (App. C, *infra*, 16a) is reported at 710 P.2d 84 (N.M. 1985). The oral decision of the New Mexico trial court and the Order for Summary Judgment and Judgment (the relevant portions of which are contained in App. B, *infra*, 11a - 13a) are not reported.

JURISDICTION

The Judgment of the Supreme Court of the State of New Mexico sought to be reviewed was entered on December 2, 1985. The order of the Supreme Court of the State of New Mexico denying petitioner Baca's Motion For Rehearing in this case was entered on December 19, 1985. Therefore, this petition is timely. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

The Jones Act of 1927, ch. 57, §§1-2, 44 Stat. 1026, as amended by Act of May 2, 1932, ch. 151, §1, 47 Stat. 140, Act of April 22, 1954, ch. 169, §§1-2, 68 Stat. 57, Act of July 11, 1956, ch. 573, 70 Stat. 529, codified as amended at 42 U.S.C. 870 - 871, and Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299, are set forth in App. H, App. I, and App. J, *infra*, 46a - 52a.

STATEMENT

1. This case involves the applicability and interpretation of the Jones Act, 42 U.S.C. 870-871. The issue of the applicability and interpretation of the Jones Act was raised to the trial court—the District Court of Chaves County—in petitioner Baca's Memorandum Brief in Support of Motion For Summary Judgment (App. E, *infra*, 19a - 33a). In that Memorandum Brief, petitioner Baca argued that the mineral reservation to the state in the Patent for State Land at issue is governed by the Jones Act and must be interpreted to include a reservation of gravel, consistent with this Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983). Memorandum Brief in Support of Motion For Summary Judgment 6-15 (App. E, *infra*, 24a - 32a).

The District Court agreed with petitioner Baca's contention. It found that the mineral reservation in the Patent for State Land at issue was to be interpreted under federal law and this Court's decision in *Watt v. Western Nuclear Inc., supra.* It then held that the Patent for State Land reserved sand and gravel to the state and granted petitioner Baca's Motion For Summary Judgment (App. B, *infra*, 11a - 15a). The respondents appealed the decision to the Supreme Court of the State of New Mexico.

The issue of the applicability of the Jones Act, and the issue of the interpretation of the Jones Act as including within its terms a reservation of gravel to the State of New Mexico, were raised squarely to the Supreme Court of the State of New Mexico in petitioner Baca's Answer Brief (the relevant portions of which are set out in App. F, *infra*, 34a - 40a). The

Opinion of the Supreme Court of the State of New Mexico, which is the subject of this petition, explicitly acknowledged that the issues of the applicability and interpretation of 42 U.S.C. 870 had been raised, but erroneously concluded, after a lengthy discussion, that the Jones Act was inapplicable to this case and that the mineral reservation would be interpreted solely as a question of state law (App. A, *infra*, 4a - 8a).

In a Motion For Rehearing, petitioner Baca again raised the applicability and interpretation of 42 U.S.C. 870 (App. G, *infra*, 41a - 45a). The Supreme Court of the State of New Mexico denied the Motion For Rehearing without explanation (App. C, *infra*, 16a).

The above facts demonstrate that the federal question—the applicability and interpretation of the mineral reservation requirements of the Jones Act, 42 U.S.C. 870—was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

2. The Jones Act, 42 U.S.C. 870-871, was enacted to cure serious deficiencies in the original land grants by the federal government to the States of New Mexico, Arizona, California, Colorado, Idaho, Nevada, Montana, Oregon, Washington, Wyoming and Utah for the purpose of supporting the public schools. These original grants, generally contained in the enabling acts of these states, provided that the proceeds and income from these so-called school lands should constitute a permanent trust fund for the support of common or public schools. The school land grants in enabling acts, such as New Mexico's, only transferred so-called "nonmineral" numbered school section lands to the state. New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910). This "mineral" vs. "non-

mineral" distinction was so vague and subject to interpretation that it spawned "much vexatious and costly litigation" over whether particular numbered school section lands had indeed been vested in the state. In some instances, this litigation over whether school section land was "nonmineral" or "mineral" did not occur until well after the state had sold the land in question to a private third party. H. R. Rep. No. 1617, 69th Cong. 2d Sess. 4 (1926) [hereinafter cited as H. R. Rep. No. 1617].

The Jones Act was enacted to rectify this situation. With exceptions not relevant here, the Act placed title to all numbered school section lands unequivocally in the various affected states, including New Mexico. By doing so, the Act put an end to the interminable flood of litigation and stablized and quieted titles to numbered school section lands. Moreover, the Act required that "all minerals must be reserved by the State in any 'lands sold, granted deeded or patented. . . .' " H. R. Rep. No. 1617, at 2. In order to enforce this requirement, the Act provided further that if a state failed to comply with this mineral reservation requirement,". . .proceedings may be instituted by the Attorney General for the purpose of forfeiting to the United States any lands disposed by the states in contravention of the provision of the act." H. R. Rep. No. 1617, at 2. House Report No. 1617 concluded that: "It will be readily observed that the provision requiring the states to reserve unto them-selves all minerals in lands sold or transferred protects the state and conserves the natural resources." H. R. Rep. No. 1617, at 3.[1]

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[1] The Jones Act was amended in 1932, 1954 and 1956 to

3. The fee simple absolute title to both the surface and subsurface estates in the land at issue in this litigation previously was held by the State of New Mexico. Pursuant to the New Mexico Constitution, most of the land transferred from the United States to New Mexico, including numbered school section lands, is held in trust by the State of New Mexico for support of public schools. New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910). The New Mexico Constitution established the elected office of Commissioner of Public Lands as the trustee of these lands. New Mexico Constitution, Article 13, Section 2. Jim Baca is the present Commissioner of Public Lands.

In 1964, a Patent for State Land for the land in question in this case was issued by the Commissioner of Public Lands to one Glaze M. Sacra.[2] The patent set out the following reservation:

> . . . and reserving also to the State of New Mexico all minerals of whatsoever kind, including all oil and gas, in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith . . . .

(App. E, *infra*, 21a).

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correct perceived technical deficiencies which are not relevant to the mineral reservation issue.

[2] After numerous transfers of title, the property was acquired by respondents David and Sheila Roe in October, 1981. (App. E, *infra*, 21a).

The Patent governing the land at issue (New Mexico Patent for State Land No. 2863) conveyed portions of numbered school sections clearly governed by 42 U.S.C. 870 as well as other state lands not governed by 42 U.S.C. 870 (App. G, *infra*, 42a). The specific land on which the disputed gravel is located and which is the subject of the litigation is a portion of the patented land which is not part of a numbered school section.

In February, 1981, the petitioner State Highway Department of the State of New Mexico obtained a Materials Lease from respondent United Continental New Mexico, Inc., the Roes' immediate predecessor in interest. This lease gave the petitioner State Highway Department of the State of New Mexico permission to enter upon the land which is the subject of the litigation and remove gravel in exchange for payments to be made on a tonnage basis. This agreement subsequently was voided after the State Highway Department discovered that the state already owned the mineral rights to the land pursuant to the Patent. Later in 1981 the petitioner Commissioner of Public Lands of New Mexico issued a sand and gravel lease on the land at issue whereby the petitioner State Highway Department agreed to pay the Commissioner fifty cents per ton of gravel removed. The petitioner State Highway Department then entered into a highway construction contract with petitioner Kent Nowlin Construction Company, which gave the company the right to enter upon the land and remove gravel for highway building purposes (App. A, *infra*, 3a).

Respondents David and Sheila Roe, owners of the land on which this affected gravel deposit was located, brought an inverse condemnation action in the Dis-

trict Court of Chaves County against the petitioner Commissioner of Public Lands of New Mexico, petitioner State Highway Department of the State of New Mexico and petitioner Kent Nowlin Construction Company. Respondent Buena Vida, Inc. and respondent United Continental joined the suit as plaintiffs, alleging damages for partial condemnation of their subdivision, which lies immediately adjacent to the gravel deposit at issue (App. A, *infra*, 1a - 2a).

The District Court of Chaves County granted the petitioners' Motion For Summary Judgment. The District Court found that the conveyance of the property at issue was governed by the Jones Act, 43 U.S.C. 870. The District Court then found, on the authority of this Court's decision in *Watt v. Western Nuclear, Inc., supra*, and 42 U.S.C. 870, that the mineral reservation in the Patent for State Land included a reservation of gravel to the state (App. B, *infra*, 12a).

The Supreme Court of the State of New Mexico reversed the decision of the District Court of Chaves County. It held that, on its face, 42 U.S.C. 870 only applied to numbered school section lands. The New Mexico Supreme Court reasoned that, since the exact parcel of land on which the gravel deposit in question was located was not in a numbered school section, federal law, *i.e.*, the Jones Act and this Court's decision in *Watt v. Western Nuclear, Inc., supra*, did not apply (App. A, *infra*, 7a - 8a). The Supreme Court of the State of New Mexico then went on to decide, solely as a matter of state law, that the general reservation in Patent for State Land No. 2863 of "all minerals of whatsoever kind" did not reserve sand

and gravel because the reservation did not explicitly reserve sand and gravel to the state (App. A, *infra*, 9a).

Petitioner Baca filed a Motion For Rehearing. This Motion pointed out that the Supreme Court of the State of New Mexico's Opinion appeared to have overlooked the fact, clearly set out in the pleadings, that the mineral reservation was contained in a Patent for State Land which conveyed both numbered school sections clearly governed by 42 U.S.C. 870 and other state lands not governed by 42 U.S.C. 870. The Motion further pointed out that, since the mineral reservation in the Patent for State Land was required by 42 U.S.C. 870, its interpretation was a matter of federal law (App. G, *infra*, 41a - 43a). The Motion pointed out that in *Watt v. Nuclear Western, Inc.*, *supra*, this Court had construed a mineral reservation requirement identical to that in 42 U.S.C. 870 to include a reservation of gravel. As noted *supra*, the Supreme Court of the State of New Mexico denied the Motion For Rehearing without explanation (App. C, *infra*, 16a).

REASONS FOR GRANTING THE PETITION

The decision by the Supreme Court of the State of New Mexico erroneously resolved the question of interpretation of a mineral reservation in a Patent for State Land which was required by federal law (the Jones Act, as codified by 42 U.S.C. 870). The decision, which held that a reservation of "all minerals of whatsoever kind" did not include gravel, is in direct conflict with the decision of this Court in *Watt v. Western Nuclear, Inc.*, *supra*. *Watt v. Western Nuclear, Inc.* interpreted a mineral reservation

requirement in Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C 299, which is identical to the mineral reservation requirement in the Jones Act, as including a reservation of gravel.[3] The decision of the Supreme Court of the State of New Mexico, by interpreting the Commissioner of Public Land's standard Patent for State Land mineral reservation language as excluding a reservation of gravel to the state, has placed an estimated 3,120,000 acres of numbered school section lands in New Mexico in danger of being forfeited to the federal government, pursuant to 42 U.S.C. 870(b). Thus, in reality, the Supreme Court of the State of New Mexico has decided a federal question in a way which is in conflict with applicable decisions of this Court and which is contrary to the intent of Congress in passing the Jones Act.

1) Precedent Indicates That The Mineral Reservation In The Jones Act Encompasses Gravel.

Unlike the *Watt v. Western Nuclear, Inc.* case, *supra*, the instant case potentially involves a great deal more than the title to gravel located on the surface estate of lands conveyed by the government to private parties. The Jones Act requires that all numbered school section land conveyed by the State of New Mexico contain a reservation of "all the coal and other minerals" to the state. 42 U.S.C. 870(b). The Jones Act mandates that any lands or minerals disposed of

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[3] Coincidentally, the *Watt v. Western Nuclear, Inc.*, decision overruled another Supreme Court of the State of New Mexico decision in *State ex. rel. Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971), which erroneously had held that gravel was not reserved to the United States under the Stock-Raising Homestead Act.

contrary to the mineral reservation requirement of the Jones Act are to be forfeited to the United States "...by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the district in which the property or some part thereof is located." 42 U.S.C. 870(b).

The Supreme Court of the State of New Mexico ruled, in the decision which is the subject of this petition, that the mineral reservation language used for decades by the Commissioner of Public Lands of New Mexico in Patents for State Land conveying numbered school sections, which was drafted to comply with the requirements of 42 U.S.C. 870, does not reserve gravel to the state. This Court in *Watt v. Western Nuclear, Inc., supra,* ruled that the mineral reservation requirement of the Section 9 of the Stock-Raising Homestead Act, 43 U.S.C. 299, which contains exactly the same description of the minerals covered as the Jones Act, 43 U.S.C. 870(b), ("...all the coal and other minerals in the lands....") includes a reservation of gravel.

The decision in *Watt v. Western Nuclear Inc., supra,* compels the conclusion that the mineral reservation requirement in the Jones Act also must be interpreted as requiring a reservation of gravel to the state. Therefore, the instant decision of the Supreme Court of the State of New Mexico that the mineral reservation, used by the Commissioner of Public Lands in Patents for State Land to convey lands which include numbered school sections, does not reserve gravel could place the state in violation of the Jones Act's mineral reservation requirements and trigger the forfeiture provisions of the Jones Act.

The Commissioner of Public Lands' records have been reviewed and it is estimated that the Commissioner's office has issued approximately 3,275 patents which conveyed to third parties approximately 3,120,000 surface acres of numbered school section lands since the Jones Act was enacted in 1927. The Commissioner of Public Lands also estimates that, for the year July 1, 1984 to June 30, 1985, the royalties paid to the state for minerals reserved in these estimated 3,120,000 surface acres of numbered school section lands were $49,200,000. These royalities are to be used to further public education.

If 42 U.S.C. 870(b) requires a reservation of gravel to the state, the instant decision of the Supreme Court of the State of New Mexico seriously jeopardizes the title to these estimated 3,120,000 acres of numbered school section lands. By failing to reserve gravel, the conveyances of these approximately 3,120,000 surface acres would be in violation of the Jones Act and all this acreage would be subject to forfeiture to the United States. 42 U.S.C. 870(b). The forfeiture of this vast acreage and the loss of these substantial mineral royalities would be catastrophic for the State of New Mexico, its inhabitants, and its public schools.

2) The Decision Of the Supreme Court Of The State Of New Mexico In Effect Clouds The Title To Numbered School Section Lands Conveyed Under State Patents For Land And Produces A Result Contrary To The Legislative Intent Of The Jones Act.

The practical impact of the Supreme Court of the State of New Mexico's decision in the instant case, at the very least, is to cloud the title of New Mexico

to the minerals and the titles of thousands of private parties to the surface of these estimated 3,120,000 acres of numbered school section lands.[4] Thus, at best, the failure of the Supreme Court of the State of New Mexico to take the Jones Act and the *Watt v. Western Nuclear, Inc.*, decision into account when interpreting the mineral reservation at issue in this case has recreated the situation the Jones Act was enacted to cure: the clouded title to vast quantities of numbered school section lands.

The problem of clouded title to New Mexico's numbered school section lands and those of several other states emanated from the decisions of Congress to transfer so-called "nonmineral" land to the states for support of their public schools. *See, e.g.*, New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910). Since the state only was vested with the nonmineral land, the question of whether title to a particular parcel of land has vested in the state generally depended on whether the land was of "known mineral character." S. Rep. No. 603, 69th Cong., 1st Sess. 4 (1926) [hereinafter cited as S. Rep. No. 603].

The Secretary of Interior reported to Congress that the question of whether a numbered school section was of "known mineral character" had "resulted in much vexatious and costly litigation, as there is no statute of limitations which prevents inquiry at any time either by way of government proceedings or by private contest or protest, as to whether or not school section land has vested in a state." S. Rep. No. 603,

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[4] To put this huge acreage into perspective, 3,120,000 acres is 6,875 square miles, or a land area slightly larger than the State of Connecticut.

at 4. In addition, disputes as to title to numbered school sections often arose many years after a state presumably had received title to the land. In some instances, the dispute as to title did not arise until years after the state had conveyed title to innocent third parties. S. Rep. No. 603, at 4. The result was ". . .hopeless, endless confusion and chaos. . . ." S. Rep. 603, at 5. The Jones Act sought to solve the problem of clouded titles and endless litigation by relinquishing to the various states and territories the title of the United States to all lands designated in the Act in aid to common or public schools. H. R. Rep. No. 1617, at 2. In other words, the Congress gave the affected states and territories title to the "mineral" numbered school section lands. Except for technical amendments in 1932, 1954 and 1956, the Jones Act has remained unchanged since its passage in 1927.

3) The Jones Act Required The States To Reserve And Withhold Unto Themselves All Minerals, With The Right, However, To Lease The Minerals In The Numbered School Section Lands Granted By The Federal Government.

The states which were the beneficiaries of the Jones Act paid a price for its passage and for the receipt of the mineral lands. There was a concern that if the states were given title to valuable mineral lands the states would transfer title to these minerals to third parties at low prices and "fritter away" assets meant to support the public schools. 69 Cong. Rec. 1820 (1927) (remarks of Senator Jones), Hearings on S.564 Before the House Committee on Rules, 69th Cong. 2d Sess. 11-12, 21, 30 (1927). There also was concern expressed that the Jones Act was giving additional

mineral rights owned by the federal government to the affected states. H. R. Rep. No. 1617, at 3-4, Hearings on S.564 Before the House Committee on Rules, 69th Cong., 2d Sess. 11, 69 Cong. Rec. 1816-17 (1927) (remarks of Representative Colton).

The Congress therefore added what was described as a "conservation measure":

> The bill also requires the States to reserve and withhold unto themselves all minerals of whatsoever character in any and all lands which they might transfer or sell, giving them however the right to lease the minerals in the lands. . . .

69 Cong. Rec. 1817 (1927) (remarks of Representative Colton). Congress also added a provision "that in case a state fails to comply with the provision of the act, proceedings may be instituted by the Attorney General for the purposes of forfeiting to the United States any lands disposed of by the States or Territories in contravention of the provision of the act." H. R. Rep. No. 1617, at 2.

4) The Legislative History Indicates That The Mineral Reservation Requirement In The Jones Act Is To Be Interpreted As Broadly As The Mineral Reservation In The Stock-Raising Homestead Act.

The question thus arises as to whether Congress, in using the exact same words to describe the required mineral reservations in both Section 9 of the Stock-Raising Homestead Act and the Jones Act: ("all the coal and other minerals in the lands"), intended these mineral reservations to be co-extensive. This question must be resolved in terms of the intention

of Congress in passing the Jones Act. *Watt v. Western Nuclear, Inc., supra,* 462 U.S. at 44.

The legislative history set forth above establishes that, in passing the Jones Act, the Congress had decided to transfer the title of the federal government to school section lands which were "mineral" in character to the states, including New Mexico. It also was the express intention of the Congress that the minerals in numbered school section lands be conserved by the states.

The legislative history of the Jones Act also reveals that the Congress was considering the term "minerals" in the broad and inclusive sense in which the Department of Interior had been using the terms to claim numbered school section lands. Representative Colton of Utah told his colleagues at the time of passage of the Jones Act that the Act required the states to reserve "all minerals of whatsoever character." 69 Cong. Rec. 1817 (1927).

In testifying before the House of Representatives Committee on Rules, Representative Colton explained that the Department of Interior was asserting that limestone "and other stones of very questionable value" were minerals and thus lands containing them were mineral in character. Hearings on S.564, at 11. Senator Jones, at the same hearing, pointed out that the Department of Interior was asserting that even sand was a mineral. Hearings on at S.564, at 19.

Other joint hearings held in 1926 before the Senate Committee on Public Lands and Surveys and the House Committee on the Public Lands also demonstrate the expansive nature of the term "minerals" as it was understood by the Congress in dealing with

the numbered school section land problem. At those hearings, Representative Sinnot asked First Assistant Secretary of Interior Finney whether, in determining whether land was mineral, the Department of Interior used the test: "the discovery of minerals in such quantities as would justify an ordinarily prudent man in going ahead in making expenditures." Assistant Secretary Finney replied the Department did and that the Department went even further: ". . .the department asserts, and has been supported by the courts, its right to apply the same rule miners and businessmen would apply: namely, to consider the geological formation, the mineralogical conditions and any other evidence on the land itself or upon surrounding lands which would convince an ordinarly prudent man or an experienced miner that the land is mineral." Joint Hearings on S.3078 and H.R. 9182 Before the Senate Committee on Public Lands and Surveys and the House Committee on Public Lands, 69th Cong.,1st Sess. 18-19 (1926) [hereinafter cited as Joint Hearings].

In the same joint hearings, Well R. Murry, Engineer Member of the State Board of Land Commissioners, State of Colorado, described the problems created for the states because of the expansive interpretation of the term "mineral" the Department of Interior was taking: ". . .the first grants to the various public-land states contained no reservations of minerals, subsequently the mineral lands were exempted, and while at first restricted to those substances obviously mineral, has been by the Land Department gradually enlarged and extended until now it includes coal, petroleum, building stone, and other substances, and if the present tendencies are

followed, may be extended to all mineral products in trade or commerce or substances possessing economic value for its use in trade, manufacture or the arts." Joint Hearings, at 91.

The above-described legislative history reflects the recognition by the Congress of the broad scope of the concept of minerals being applied by the Department of Interior.[5] In particular, it reflects a recognition by Congress of the so-called "prudent man" test for determining whether land was mineral in character. The "prudent man" test also has been used by the Department of Interior since 1894 to interpret the mining laws. *Watt v. Western Nuclear, Inc.*, *supra* 462 U.S. at 58-9, n. 18. This Court has noted it repeatedly has approved the use of the "prudent man" test. *Id.* In addition, in *Watt v. Western Nuclear, Inc.*, this Court clearly approved the treatment of gravel as a mineral under the general mining law. *Id.*

The analysis this Court applied in *Watt v. Western Nuclear, Inc.* to find gravel to be a mineral under Section 9 of the Stock-Raising Homestead Act applies with equal force to the Jones Act, which has the exact same mineral reservation requirement as the Stock-Raising Homestead Act. As a matter of consistent interpretation of statutes concerning the same subject matter, if gravel deposits constitute mineral deposits under the mining laws and under the Stock-Raising

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[5] Although, it is clear that in passing the Jones Act, Congress was expressing its desire to put at an end the problems created by the expansive concept of what substances were mineral, there is nothing to indicate that Congress intended the mineral reservation requirement of 42 U.S.C. 870 to be governed by a concept of minerals which was narrower than that being used by the Department of Interior.

Homestead Act, then presumptively gravel should constitute a mineral required to be reserved under the Jones Act. *Id.*

There is no indication in the legislative history of the Jones Act itself that Congress intended the mineral reservation in the Jones Act to be narrower in scope than the mining laws. *Accord, Id.* Indeed, the express purposes of the Jones Act, to quiet titles by transferring the federal government's mineral rights in numbered school sections to the states and to require the states to reserve these minerals in any conveyance of numbered school section land, could not be achieved by fashioning a mineral reservation in the Jones Act which was narrower in scope than the mining laws.

5) The Supreme Court Of The State Of New Mexico Erroneously Decided A Federal Question.

It is no answer to the very real problems attendant to the Jones Act to argue, as the Supreme Court of the State of New Mexico did in its decision, that, since the gravel deposit at issue in this case fortuitously was not on a numbered school section, the Jones Act and this Court's decision in *Watt v. Western Nuclear, Inc., supra,* are inapplicable (App. A, *infra,* 8a). The Patent for State Land which contained the mineral reservation interpreted by the Supreme Court of the State of New Mexico conveyed numbered school section lands as well as other state lands which were not numbered school section lands. The land on which the gravel at issue is situated fortuitously was not on land governed by the Jones Act. However, the Patent for State Land which conveyed the land and which contains the applicable mineral reservations *is*

governed by the Jones Act, because the Patent for State Land also clearly conveyed numbered school section lands subject to the Jones Act.

It simply strains credulity to believe that the court of any jurisdiction would construe a single mineral reservation in a single Patent for State Land, which conveyed both numbered school section lands governed by the Jones Act as well as other state lands not governed by the Jones Act, in contradictory ways, *i.e.*, the mineral reservation includes gravel on those portions of the lands which are numbered school section lands and excludes gravel on those portions of the land which are not numbered school section lands. Such a result would be difficult to explain, no less to defend or to understand. It also is a highly unlikely result, since the Supreme Court of the State of New Mexico already has refused to recognize a reservation of gravel in a general reservation of all the minerals in a contract of purchase for numbered school section lands. *Jensen v. State Highway Commission*, 97 N.M. 630, 642 P.2d 1089 (1982).

In any event, given the clear purpose of the Jones Act to clear titles, it would be contrary to that express purpose to permit the forfeiture provisions of 42 U.S.C. 870(b) to cloud or to jeopordize the title to an estimated 3,120,000 acres of numbered school section lands in New Mexico and to put at risk many millions of dollars of mineral royalities used to fund public schools. The Supreme Court of the State of New Mexico ignored its obligation to interpret the mineral reservation at issue as a matter of federal law and to find, consistent with the Jones Act, 42 U.S.C. 870, and this Court's decision in *Watt v. Western Nuclear, Inc.*, *supra*, that gravel was reserved to

the state by the all inclusive reservation of the Patent for State Land.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER E. DIERCKS
Counsel of Record
ERIC M. RUBIN
ERIE F. SAMPSON
RUBIN, WINSTON & DIERCKS
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870
Attorneys for Petitioners

Of Counsel:
ARTHUR J. WASKEY
General Counsel, Commissioner of Public Lands
BILL R. GARCIA
Special Assistant Attorneys General
of the State of New Mexico
Attorneys for Jim Baca, Commissioner
of Public Lands of the State of New Mexico

REESE C. JONES
Special Assistant Attorney General
Attorney for State Highway Department
of the State of New Mexico

KENNETH C. DOWNES
Attorney for Kent Nowlin Construction Company

March 19, 1986

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 15,263

DAVID ROE and SHEILA ROE,
BUENA VIDA, INC., a corporation,
and UNITED CONTINENTAL NEW MEXICO,
INC., a corporation,
Plaintiffs-Appellants,

vs.

STATE OF NEW MEXICO, ex. rel.
STATE HIGHWAY DEPARTMENT OF THE
STATE OF NEW MEXICO, JIM BACA,
Commissioner of Public Lands of
New Mexico, and KENT NOWLIN
CONSTRUCTION COMPANY, a corporation,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
William J. Schnedar, District Judge

FILED
DEC. 2, 1985

OPINION

FEDERICI, Chief Justice

Plaintiffs-appellants, David and Sheila Roe (Roes), filed this action in the District Court of Chaves County in in-

verse condemnation to recover damages, including reasonable attorney fees and expenses, from defendants-appellees, the New Mexico State Highway Department (SHD), the New Mexico Commissioner of Public Lands (Commissioner) and Kent Nowlin Construction Company. Buena Vida, Inc. and United Continental New Mexico, Inc., also plaintiffs-appellants, joined the Roes in the suit, seeking damages for partial condemnation of their subdivision, which lies immediately adjacent to the gravel pit created by defendants on the land of the Roes.

After some discovery and various motion hearings, the trial court granted the Commissioner's motion for summary judgment, in which the other defendants joined. The trial court held that the gravel belonged to the State of New Mexico under a reservation of "minerals" and ordered that any claim of plaintiffs not based on ownership of the gravel be dismissed without prejudice. Plaintiffs appeal. We reverse.

The issue we decide on appeal is whether the gravel on the subject property belongs to the surface estate owner or was reserved to the State of New Mexico under a general mineral reservation contained in the contract of purchase and the patent for the property.

The property is legally described as the E 1/2 SE 1/4 of Section 4, Township 11 South, Range 22 East, N.M.P.M. in Chaves County, New Mexico. This land was conveyed to the State of New Mexico by the United States Government by Clear List No. 5748, dated March 27, 1915, approved by the Secretary of the Interior under Clear List No. 121, dated April 16, 1920. In August 1964, New Mexico Patent for State Land No. 2863 issued to Glaze M. Sacra pursuant to a contract for purchase. The Roes are the successors in interest to Glaze M. Sacra's rights and interests in the subject land.

The "Application to Purchase" made by Mr. Sacra encompassing the subject property contained the following statement:

> I further state that the land applied for herein is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, including but not limited to caliche, *sand and gravel,* coal, oil or gas lands fraudulently but with the sole object of obtaining title to the surface of the land applied for. (Emphasis added.)

The purchase contract, however, simply stated that "the minerals therein shall be and are reserved," and the patent reserved "to the State of New Mexico all minerals of whatsoever kind."

In February 1981, the SHD obtained a Materials Lease from United Continental New Mexico, Inc., the Roes' immediate predecessor in interest, which granted the SHD permission to enter upon the land and remove gravel, in return for compensation on a tonnage basis. This agreement was subsequently voided by the SHD. Later in 1981, the Commissioner issued a Sand and Gravel Lease on the subject land to the SHD. In return, the SHD agreed to pay the Commissioner fifty cents per ton of gravel removed. The SHD entered into a highway construction contract with Kent Nowlin Construction Company, which purportedly granted the company the right to enter upon the land to remove gravel. The gravel was used for highway building purposes. According to the SHD's records, a total of approximately 174,000 cubic yards of processed gravel was expected to be removed.

The gravel is located on the surface of the land. There is no overburden. It is of "fair quality" and is quite common to the area which is the old watercourse of three rivers -- the Pecos, the Hondo, and Blackwater Draw. Gravel has been removed from the land to a depth of

approximately 30 feet, and the bottom of the gravel deposit has not yet been reached. Prior to the destruction of the surface, natural vegetation grew on the land.

The Roes contend that they are the owners of the gravel removed from the surface; that the Sand and Gravel Lease issued by the Commissioner to the SHD is invalid; that the SHD could not grant to Kent Nowlin Construction Company any rights to the gravel; and that the actions of each defendant in connection with the removal of the gravel are wrongful, and constitute conversion and condemnation of the Roes' property.

The Commissioner and the SHD have denied that the Roes own the gravel and allege that the gravel was reserved to the State in State Patent No. 2863. The Commissioner asserts that this reservation was made pursuant to 43 U.S.C. Section 870 (1982). Each defendant has denied that its actions in connection with the removal of the gravel were wrongful.

The trial court granted defendants' motion for summary judgment for the following reasons: first, the court believed that the conveyance of this property by the State was subject to a federal statute, 43 U.S.C. Section 870 (1982), which requires a state to reserve "coal and other minerals" when conveying the numbered sections granted to the states in support of the common schools; second, the trial court determined that the United States Supreme Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), which interpreted a similar mineral reservation under the Stock-Raising Homestead Act of 1916, 43 U.S.C. Sections 291-302 (1982), controlled on the issue of the proper interpretation of "coal and other minerals" under Section 870. The trial court erred in applying federal law rather than state law to the issues of this case.

The conveyance of this land is not subject to the provisions and limitations of Section 870. Section 870 provides, in pertinent part:

> Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are, extended to embrace numbered school sections mineral in character, *unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.* (Emphasis added.)
>
> . . . .
>
> (b) The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same.

By its express terms, Section 870 applies only to the specific sections of land granted to the states for support of public schools, and does not apply to land which has been "granted to and/or selected by and certified or approved . . . as indemnity or in lieu of" school land. The limited application of Section 870 is emphasized in the following section, 43 U.S.C. Section 871 (1982):

> Nothing contained in section 870 of this title is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and *said section shall not apply to indemnity or lieu selections* or exchanges or the right after January 25, 1927, to select indemnity *for numbered school sections in place lost to the State under the provisions of said section*

> *or any Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are continued in full force and effect.* (Emphasis added.)

The reasoning behind the limited application of Section 870 was explained by the Secretary of the Interior in a letter dated January 8, 1927, and addressed to the Chairman of the House Committee on Public Lands. This letter is quoted in full in the report of that Committee on Senate Bill 564, later enacted and now codified as 43 U.S.C. Sections 870, 871 (1982). H.R. Rep. No. 1761, 69th Cong., 2d Sess. (1927). In his letter, the Secretary says, referring to Section 2 of Senate Bill 564 (now codified as 43 U.S.C. § 871):

> The concluding section of the substitute bill is designed to preserve and continue in full force and effect, and without change, the rights of the States under grants other than for the purpose of common or public schools, and as to indemnity, lieu selections, or exchanges. These matters are adequately covered by existing law, and if and when selections, indemnity, or exchanges are found by the Secretary of the Interior to be of the character and subject to the provisions of existing law governing same, same are approved or certified to the State by the Secretary of the Interior. This certification or approval has been construed by this department and by the Attorney General as equivalent to a patent; that is, that after approval or certification it cannot be set aside except by proceedings in the courts on the ground of fraud. There is therefore no uncertainty as to such titles, but it was deemed advisable to make it clear in this bill that the provisions of all existing laws affecting such matters remain in full force and effect.

H.R. Rep. No. 1761 at 2.

The primary purpose in the enactment of Section 870 was to resolve disputes in the title to common school lands caused by the Interior Department's policy of challenging a state's title to any such land whenever minerals were later discovered thereon, regardless of how long ago the state's title had vested. *See* S. Rep. No. 603, 69th Cong., 1st Sess. (1926); H.R. Rep. No. 1617, 69th Cong., 2d Sess. (1926). As the Secretary explained, however, there was no such uncertainty regarding the title to *in lieu land.* Section 870 therefore need not, and does not, apply to such lands.

The Committee report again emphasizes the limited scope of Senate Bill 564, stating:

> It will be further noted that under the provisions of the act only those lands granted to the States for the benefit of their common or public schools are affected; that is to say, *the numbered sections that were granted by Congress to the States are the only lands affected by the provisions of the bill.*

H.R. Rep. No. 1761 at 3 (emphasis added).

The "numbered sections" which New Mexico was granted "for the support or in aid of common or public schools," Section 870, as specified in Section 6 of the Enabling Act For New Mexico are Sections 2, 16, 32, and 36 of each township. Ch. 310, 36 Stat. 557 (1910) (codified as amended at NMSA 1978, Pamphlet 3) (Enabling Act). In this case the land on which the gravel pit is located is in Section 4. This land is not in one of the numbered "school" sections, and is therefore not subject to the provisions of Section 870.

The land was selected by the State *in lieu of,* or as indemnity for, common school land. *See* Enabling Act § 6; 43 U.S.C. §§851, 852 and 854 (1982) (providing for such

selections). This Court has not found any federal prohibition of, or limitation on the State's right to sell or otherwise convey such lieu lands, comparable to the limitation which Section 870 imposes on the sale of numbered sections of common school land. Regardless of precisely how the State's title arose, however, it is obvious that the land, simply by virtue of being in Section 4, is not a "numbered school section in place." § 870. The express terms of Sections 870 and 871 clearly provide that Section 870 does not apply to this land. Since Section 870 does not apply, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), which construes under another federal act a mineral reservation similar to that contained in Section 870, is not controlling.

The question of the proper interpretation of the mineral reservation in the subject land is therefore not one of federal law, but solely of state law. Thus, this question is not controlled by a federal decision on a federal statute, but rather by the New Mexico Constitution, the Enabling Act, New Mexico statutes and New Mexico case law. N.M. Const. art. XII, § 2; the Enabling Act; NMSA 1978, §§ 19-1-1 to 19-15-10 (Repl. 1985); *Jensen v. State Highway Commission*, 97 N.M. 630, 642 P.2d 1089 (1983), *cert. denied*, 459 U.S. 838 (1983). *See also Burguete v. Del Curto*, 49 N.M. 292, 163 P.2d 257 (1945); *State ex rel. Otto v. Field*, 31 N.M. 120, 241 P. 1027 (1925) (New Mexico Commissioner of Public Lands has complete control over State lands).

Generally, the cases in New Mexico are in agreement that sand and gravel are not included within the scope of a general mineral reservation contained in a contract of sale or patent. *Jensen; Rickelton v. Universal Contractors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978); *State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971). Recently this Court overruled *Trujillo* to the extent that it conflicts with the United States Supreme Court's *Western Nuclear*, because the land at issue in *Trujillo* was subject to the mineral reservation contained in

the Stock-Raising Homestead Act of 1916, 43 U.S.C. Sections 291-302 (1982), which was construed in *Western Nuclear. Champlin Petroleum Co. v. Lyman,* 24 SBB 1199 (1985). As already explained, the property at issue in the present case is not subject to a federal act that would bring it within the scope of federal case law.

New Mexico case law is somewhat unsettled, however, as to the significance to be given the statement in the Application to Purchase. In *Burris v. State ex rel. State Highway Commission,* 88 N.M. 146, 538 P.2d 418 (1975), largely because of a similarly worded application, the Court held that the parties intended to reserve sand and gravel to the Commissioner of Public Lands. *Rickelton,* holding that gravel was not reserved, distinguished *Burris* based upon the specific provision concerning sand and gravel contained in the original "application to purchase" that apparently was not present in *Rickelton.* In *Jensen* this Court held that absent a specific contractual provision reserving sand and gravel, common sand and gravel were not "minerals" under a general mineral reservation contained in a contract of purchase or patent. Although *Jensen* distinguished *Burris* upon the mistaken belief that the specific sand and gravel provision in *Burris* was contained in the purchase contract, when in fact it was in the original application, the *Jensen* Court clearly intended that the language of a purchase contract or patent should control. An application is merely a request to purchase, and its provisions do not affect the title to the property. The title that passes is determined by the conveyances themselves, the purchase contract and the patent. For the State to reserve sand and gravel, a provision so specifying must be included in these conveyances. To the extent that *Burris* may be construed to be inconsistent with this opinion, it is hereby overruled.

In the instant case, we determine that although the original applicant for the Roes' property did not apply for title to sand and gravel, such title nevertheless passed with

the surface estate since sand and gravel were not specifically reserved by the purchase contract and patent. Based upon the undisputed facts in this case and the applicable New Mexico law, the trial court's summary judgment in favor of defendants-appellees is reversed and the cause remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ WILLIAM R. FEDERICI

WILLIAM R. FEDERICI, Chief Justice

WE CONCUR:

/s/ DAN SOSA, JR.

DAN SOSA, JR., Senior Justice

/s/ WILLIAM RIORDAN

WILLIAM RIORDAN, Justice

APPENDIX B

STATE OF NEW MEXICO

COUNTY OF CHAVES

IN THE DISTRICT COURT

No. CV 82-8

DAVID ROE and SHEILA ROE,
BUENA VIDA, INC., a corporation,
and UNITED CONTINENTAL NEW MEXICO
INC., a corporation,

Plaintiffs,

vs.

STATE OF NEW MEXICO ex. rel.
STATE HIGHWAY DEPARTMENT OF THE
STATE OF NEW MEXICO, JIM BACA,
Commissioner of Public Lands of
New Mexico, and Kent Nowlin
Construction Company, a corporation,

Defendants.

PARTIAL TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY JUDGMENT HELD ON SEPTEMBER 14, 1983

BE IT FURTHER REMEMBERED, that the above styled and numbered cause came on for hearing on the 14th day of September, 1983, before the Honorable W.J. Schnedar, District Judge of the Fifth Judicial District Court, at the Courthouse, Roswell, Chaves County, New Mexico the Plaintiffs being represented by Mr. Charles Malone, Esquire, and Mr. Tracy Sprouls, Esquire, and the Defendants being represented by Mr. Bill Garcia, Esquire,

Mr. Reese Jones, Esquire, and Mr. Richard Russell, Esquire; whereupon, the following proceedings were had,

TO-Wit:

(Court in session at 1:30)

THE COURT: This is set on a hearing for summary judgment and a pre-trial conference. I think I'll hear the motions for the summary judgment first and then after that we'll have the pre-trial. All right. Who wants to go first?

THE COURT: I've reviewed the memorandum and authority and I feel that if *Watt* had been decided, of course, in 1971 or sometime before, the *Trujillo* decision would have been different. If the *Watt* decision came down shortly after the *Trujillo* decision, we probably wouldn't have the other decisions and *Trujillo* would be overruled by now. I can't overcome the fact that I feel that both the State and the patentee intended to be controlled by what power the State had to do and compliance with the law 870 and that would be an overriding intent of the parties and could not have been determined until it was accepted by the Supreme Court of New Mexico since we have this determination, I feel that the Supreme Court would probably overrule *Trujillo* except not in that particular case, but would go to the interpretation that the Supreme Court has said is the interpretation. And that *Trujillo* just isn't good authority any more in cases involving the Stock Raising Homestead Act or laws closely associated with that, which I hold that the Section 870 of 1926 would be, so I'll grant summary judgment to the State of New Mexico on the point that they raised, that in view of the *Watt* decision, they now own the minerals not withstanding what the parties may have thought they were getting in view of the *Trujillo* case at an earlier date.

I assume that Plaintiffs would want to appeal this decision rather than go forward with the trial at this time.

STATE OF NEW MEXICO

COUNTY OF CHAVES

IN THE DISTRICT COURT

No. CV 82-8

DAVID ROE and SHEILA ROE;
BUENA VIDA, INC., a corporation;
and UNITED CONTINENTAL NEW MEXICO,
INC., a corporation,

Plaintiffs,

v.

STATE OF NEW MEXICO, ex rel.
STATE HIGHWAY DEPARTMENT OF
THE STATE OF NEW MEXICO; JIM BACA,
Commissioner of Public Lands of
New Mexico; and KENT NOWLIN
CONSTRUCTION COMPANY,
a corporation,

Defendants.

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause having come to be heard on defendants' Motion for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure for the District Courts and the Court having considered the pleadings in the action, and having heard oral arguments and having found that there is no genuine issue of fact to be submitted to the trial court and having concluded that defendants are entitled to judgment as a matter of law, it is hereby

Ordered, that defendants' Motion for Summary Judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED:

1. That the plaintiffs' action be dismissed with prejudice.

2. Under the terms of the mineral reservation in the Patent for State Lands No. 2863 covering the East Half of the Southeast Quarter ($E^1/_2SE^1/_4$) of Section 4, Township 11 South, Range 22 East, N.M.P.M., containing 80 acres more or less, the defendant State of New Mexico, acting through its Commissioner of Public Lands, is the owner by reservation from sale, of all the minerals of whatsoever kind, including sand and gravel, together with the right to explore for, mine, and remove the same and to use the surface thereof in connection therewith, including the rights of ingress and egress thereto and therefrom and that the plaintiffs have title to the surface only.

3. Because of the ruling and determination of the ownership of the sand and gravel, all other relevant issues in the case are disposed of as well.

4. IT IS FURTHER ORDERED that any claim of plaintiff not based on ownership of the minerals is dismissed without prejudice.

/s/ W. J. SCHNEDAR

W. J. SCHNEDAR
DISTRICT JUDGE

cc: CHARLES F. MALONE
REESE C. JONES
BILL R. GARCIA
KENNETH DOWNES

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, December 19, 1985

NO. 15,263

DAVID ROE, *et al.*,
Plaintiffs-Appellants,

vs.

STATE, ex rel STATE HIGHWAY DEPARTMENT, *et al.*,
Defendants-Appellees.

This matter coming on for consideration by the Court upon Motions of Appellees for rehearing, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that motions for rehearing are hereby denied.
ATTEST: A TRUE COPY

/s/ Rose Marie Alderete

Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Mandate No. 15,263

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Chaves, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered CV 82-8 on your Civil Docket, wherein David Roe, et al were Plaintiffs and State Highway Department et al were Defendants, by your consideration in that behalf judgment was entered against said Plaintiffs; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Plaintiffs by appeal, whereupon such proceedings were had that on December 2, 1985, an Opinion was handed down by said Supreme Court and Judgment was entered reversing your judgment aforesaid, and remanding said cause to you.

NOW, THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said Opinion and said Judgment. Costs assessed in favor of Appellants as follows: Skeleton Transcript $2.00; Transcript on Appeal $642.68; Docket Fee $20.00

WITNESS, THE HON. WILLIAM R. FEDERICI,
Chief Justice of the Supreme Court
of the State of New Mexico, and
the seal of said Court this 19th

day of December, 1985.

/s/ ROSE MARIE ALDERETE

ROSE MARIE ALDERETE

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

STATE OF NEW MEXICO

COUNTY OF CHAVES

IN THE DISTRICT COURT

NO. CV 82-8

DAVID ROE and SHEILA ROE,
BUENA VIDA, INC., a corporation,
and UNITED CONTINENTAL NEW MEXICO,
INC., a corporation,

Plaintiffs,

v.

STATE OF NEW MEXICO, ex. rel.
STATE HIGHWAY DEPARTMENT OF THE
STATE OF NEW MEXICO, JIM BACA,
Commissioner of Public Lands of
New Mexico, and KENT NOWLIN
CONSTRUCTION COMPANY, a corporation,

Defendants.

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

FACTS

Plaintiffs, owners of a tract of land in Chaves County, filed this inverse condemnation action against the State Highway Department (Department), the Commissioner of Public Lands (Commissioner) and Kent Nowlin Construction (KNC), claiming that the mining and removal of materials from the land in question constitutes a conversion of the property. This removal has been previously authorized by a mineral lease (M-19855), attached as Exhibit A and incorporated herein, which was executed by the Com-

missioner to the Department. KNC, under the authority of the lease, was acting as the agent of the Department in removing materials from the land in question.

In executing the lease, the Commissioner was proceeding on the basis of the state's right to the mineral estate as well as the authority set out in Section 19-8-12 NMSA (1978) to lease lands for the removal of sand and gravel. The property covered by the lease agreement included the East Half of the Southeast Quarter (E1/2SE1/4) of Section 4, Township 11 South, Range 22 East, N.M.P.M., containing 80 acres more or less.

The fee simple estate to the land in question was previously held by the State of New Mexico, but on or about January 10, 1963, an application to purchase state lands (No. 37426) was submitted by Glaze M. Sacra. This application, attached as Exhibit B and incorporated herein, contained the following provision signed by the applicant:

> I further state that the land applied for herein is essentially non-mineral land, and that *this application is not made for the purpose of obtaining title to mineral, including but not limited to caliche, sand and gravel, coal, oil or gas lands fraudulently but with the sole object of obtaining title to the surface of the land applied for.* (Emphasis added)

On August 2, 1963, a public sale was held in Roswell, New Mexico and Glaze M. Sacra was the successful bidder on the above described land. Subsequently, on August 8, 1963 a contract for the purchase of these lands (No. 5259) was executed. This contract, attached as Exhibit C and incorporated herein, contained the following provision:

> . . .that while the land herein contracted for is believed to be essentially non-mineral land, should mineral be discovered therein *it is expressly understood and agreed that this contract is based*

> *upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with right of way to the Commissioner, or any one acting under his authority, at any and all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance.* (emphasis added)

On August 5, 1964, a patent for state land (No. 2863) was issued to Glaze M. Sacra. This patent, attached as Exhibit D and incorporated herein, sets out the following reservation:

> . . .and reserving also to the State of New Mexico all minerals of whatsoever kind, including oil and gas, in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith . . .

After numerous transfers of title, the property was acquired by the plaintiffs David and Sheila Roe in October of 1981. The warranty deed to the plaintiffs, attached as Exhibit E and incorporated herein, set out that the conveyance of the land was subject to the reservation of minerals.

ARGUMENT AND LEGAL ANALYSIS

I

The key issue presented by this litigation is whether the terms of the mineral reservation in the state patent includes sand & gravel. The questions presented by this case have been previously reviewed in a series of cases before the New Mexico Supreme Court and a review of these

decisions is essential to a complete understanding of the case at bar.

State of New Mexico, ex rel. State Highway Commission v. Trujillo, 82 N.M. 694, 487 P.2d 122 (1971), the leading New Mexico case relating to sand and gravel reservations, addressed the question of whether the reservation in the Stock Raising Homestead Act (hereinafter SRHA) necessarily included sand and gravel. The New Mexico Supreme Court found that rock removed from patended land was not intended to be reserved to the United States under the mineral reservation required by the SRHA. This reservation set out that all "coal and other minerals" be reserved on patented lands. The reasoning for this decision is predictated on the theory that the rock removed in its exposed state had no exceptional character or value, and was thus not intended to be reserved under the mineral reservation. This decision was further based on the court's conclusion that it was not the intention of Congress to create two separate estates on Stock Raising Homestead lands and that the patentee's use thereof was not limited just to the surface of the land.

To some extent, the court in *Trujillo* did address the issue of whether gravel was a mineral, acknowledging that it was mineral in character, at least in the sense that it was not animal or vegetable. But, for the most part, as pointed out above, the court looked at its interpretation of the intent of the Homestead Act and the mineral reservation.

In 1975, the New Mexico Supreme Court was again presented with the issue in *Burris v. State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (1975). Here, the question of who owned the sand and gravel on state patented land was determined not by the mineral character of the material, but rather by the intent of the parties and the various documents executed between them. The court held that the application to purchase state land,

the purchase contract, and the patent were unambiguous in terms of the intent to reserve sand and gravel to the state, and that it was not necessary to make a determination of whether sand and gravel were minerals.

The court in *Burris* distinguished its decision in *Trujillo* on the basis that the documents executed in *Burris* were clearly determinative of the intent of the parties.

After *Burris,* the Supreme Court was again asked to resolve the issue of the ownership of sand and gravel on state patented land in *Rickelton v. Universal Constructors, Inc.,* 91 N.M. 479, 576 P.2d 285 (1978). The court decided, based on the decision in *Trujillo,* that the mineral reservation of "all minerals of whatsoever kind" on the state patent did *not* include sand and gravel.

The latest New Mexico decision relating to the question of sand and gravel ownership on patented land is *Jensen et al. v. State Highway Commission,* 97 N.M. 630, 642 P.2d 1089 (1982). Under the facts of this case, the primary issue was whether sand and gravel were reserved under the provision of the purchase contract. The contract reserved "all minerals" to the state. The court, again relying primarily on its decision in *Trujillo* as well as *Rickelton,* held that the sand and gravel in question were not minerals reserved to the state, despite the trial court's finding as to the mineral characteristics of the sand and gravel and its commercial use. In addition, the Court stated that *Burris* was distinguishable in that there was no specific reservation of gravel in the purchase contract. This distinction however, was based on an erroneous reading of *Burris* since the specific acknowledgment of the intent to reserve sand and gravel was in the application to purchase and not in the purchase contract as the court in *Jensen* concluded.

These four cases decided by the New Mexico Supreme Court, with the exception of *Burris,* have established an interpretation of the mineral reservation based on reason-

ing that is totally in conflict with the Congressional mandate requiring the mineral reservation, including sand and gravel, to be used by the State. This intent was just recently specifically acknowledged and clarified by the United States Supreme Court in *Watt, Secretary of Interior, et al. v. Western Nuclear, Inc.*, 51 U.S.L.W. 4664 (U.S., June 6, 1983). Like *Trujillo*, this decision centered around the interpretation of the mineral reservation in the SRHA. It also establishes the controlling interpretation of 43 U.S.C.A. Section 870, the federal statute setting forth the requirements of the mineral reservation included in state patents conveyed by the Commissioner of Public Lands. A copy of Section 870 is attached as Exhibit F, and incorporated herein. Moreover, because the question is one of federal law, the Supreme Court's decision is binding; the decision, in effect, overrules *Trujillo*. In order to fully comprehend the reasoning involved in *Western Nuclear* it is essential to review the legislative history and reasoning behind the Congressional requirement for the state to reserve "all minerals of whatsoever kind."

When the federal government granted to the Territory of New Mexico the trust lands to support public education in the soon to be established state, it was originally intended that only non-mineral land be granted; that is, lands that were not classified as mineral at the time title passed. When a dispute arose as to oil and gas rights on lands granted to the western states, Congress, in an effort to correct and clarify the situation, enacted 44 Stat. 1026, Chapter 57, codified at 43 U.S.C.A. Section 870. Section 870 granted to these states all minerals under the lands previously granted, whether or not they had been classified as mineral in character. In addition, and of most importance to the case at bar, is the fact that the Act mandated that the states in selling these lands reserve all of the coal and other minerals, and that the minerals in such lands would be subject to lease by the state as the legislature might prescribe. The state was prohibited, how-

ever, from selling the mineral estate. The failure by the state to make these reservations would subject the lands to forfeiture by the United States.

After the Enactment of 43 U.S.C. § 870 in 1927, the New Mexico Constitution was amended by Article 24, which in turn amended Section 10 of the Enabling Act, by taking minerals out of the appraisal, advertising and competitive purchase provisions of the Enabling Act and permitting the legislature to provide for their disposal by lease.

The Committee reports on Section 870 are clear in terms of the intent of Congress in granting the mineral lands to the states. House of Representatives Report No. 1617, attached as Exhibit G and incorporated herein, states as follows:

> The bill requires the States and territories to reserve and withhold unto themselves all minerals of whatsoever character in any and all lands which they might transfer or sell, giving to them, however, the rights to lease the minerals in the land and to utilize the proceeds received as royalties on rentals "for the attainment of the purpose for which the lands were granted as the case may be."
>
> . . .
>
> It will readily be observed that the provision requiring the States to reserve unto themselves all minerals in lands sold or transferred fully protects the State and conserves the natural resources.
>
> . . .
>
> . . .It also prevents valuable mineral lands from falling into the hands of third parties, thereby insuring the proper return and full measure of support to the particular institution to which the lands were granted.

The effect of the federal legislation is many fold. First, Section 870 necessitated the amending of the Enabling Act in order to allow the legislature to provide the framework for mineral leasing as set out in Article 24 of the state constitution. Secondly, because of the confirmation to the state of the mineral lands, the requirement that all future sales of lands by the state would be subject to a reservation was also added to insure that the original intent in granting these lands by the enabling acts of the states would be preserved. Thirdly, and of greatest importance to the case at bar, is that the reservation required by Congress is identical to that which was required by Section 9 of the Stock-Raising Homestead Act of 1916. Insofar as the two mineral reservations are identical, and because there is no indication in Section 870 that Congress' intent is different than the interpretation of the reservation in the SRHA, the interpretation of the reservation contained in the state patent is clearly controlled by the United States Supreme Court's decision in *Western Nuclear, supra.*

In *Western Nuclear,* the lands had been patented under the Stock-Raising Homestead Act of 1916 (SRHA), with the required reservation of minerals. The land was later acquired by Western Nuclear, and the removal of gravel was initiated for use by the landowner. Subsequently, the BLM discovered the removal operations and determined that these actions constituted a trespass for which Western Nuclear was liable. The Interior Board of Land Appeals affirmed this decision, holding that the gravel was a mineral reserved to the United States under the SRHA. The decision was upheld by the United States District Court but reversed by the Court of Appeals. As previously stated, the primary issue was whether gravel was intended to be reserved as a mineral under the reservation of "all coal and other minerals." Upon review, the United States Supreme Court held that it had been the intent of Con-

gress that such material be reserved to the United States. This decision is based on several primary points.

First, the Court found it unnecessary to resolve the issue in terms of the definition of minerals, because, as stated in the decision "the ordinary definitions of the dictionary throw but little light upon its signification in a given case," and the "various definitions of the term "minerals" serve only to exclude substances that are not minerals under any common definition of that word." Based on this reasoning the Court set out the first basis of its decision as follows:

> . . . For a substance to be a mineral reserved under the SRHA, it must not only be a mineral within one or more familiar definitions of that term, as is gravel, but also the type of mineral that Congress intended to reserve to the United States in land patented under the SRHA.

Supra at 2923.

The second point of the decision centered on the intent of Congress at the time the SRHA was enacted. Although, as stated by the Court, the legal understanding of the term minerals did not shed much light on Congress' intent, the purpose behind the SRHA did in fact reveal this intent. It was the predominant intent of Congress that the SRHA bring about the concurrent but separate development of the surface and subsurface estates; a conclusion *totally* contrary to that reached in *Trujillo.* On this point the Court stated:

> . . . While Congress expected that homesteaders would use the surface of SRHA lands for stock-raising and raising crops, it sought to ensure the valuable subsurface resources would remain subject to disposition by the United States, under the general mining laws or otherwise to persons interested in exploiting them. It did not wish to

> entrust the development of subsurface resources to ranchers and farmers. Since Congress could not have expected that stock-raising and raising crops would entail extraction of gravel deposits from the land, *the Congressional purpose of facilitating the concurrent development of both surface and subsurface resources is best served by construing the mineral reservation to encompass gravel.*

Supra at 2926 (emphasis added).

As to mineral development on the SRHA lands the Court stated:

> To preserve incentives for the discovery and exploitation of minerals in SRHA lands, Congress reserved "all the coal and other minerals" to the United States and provided that "coal and other mineral deposits . . . shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.". . . . Congress plainly contemplated that mineral deposits on SRHA lands would be subject to location under the mining laws, and the Department of the Interior has consistently permitted prospectors to make entries under the mining law on SRHA lands.

Supra at 2930-2931.

The third point relied on by the Court was the intent of Congress as to what uses would be made of the surface estate, which inturn would shed light on what material would be reserved. It was clearly the expectation of Congress that SRHA surface lands would be used for stock raising and cultivation of crops. This intent itself was clear from the title of the Act as well as the limitation of lands involved to those which were "chiefly valuable for grazing

and raising forage crops." Based on the intended use of the surface estate the Court stated as follows:

> Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. See 1 American Law of Mining, supra, at § 326 . . .
> The interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value. *Whatever the precise scope of the mineral reservation may be, we are convinced that it includes gravel.* Like other minerals, gravel is inorganic. . .

Supra at 2933 (emphasis added).

Therefore, the Court's decision comes down to an analysis of not only the intent of the SRHA but also the determination whereby gravel is considered to be inorganic, that it can be taken from the soil, and be used for commercial purposes. As stated by the Court, if gravel is viewed as being conveyed with the surface estate, then this would make mineral exploration dependent on those entrymen under the SRHA, which would seriously conflict with the overriding purpose of the Act. Not only would this position be contrary to the intent of Congress, it would also be inconsistent with other federal statutes involving

the location of minerals on federal lands. In this regard the Court stated:

> The treatment of gravel as a mineral under the general mining laws suggests that gravel should be similarly treated under the SRHA, for Congress clearly contemplated that mineral deposits in SRHA lands would be subject to location under the mining laws, and the applicable regulations have consistently permitted such location. . . Simply as a matter of consistent interpretation of statutes concerning the same subject matter, if gravel deposits constituted "mineral deposits" that could be located under the mining laws, then presumptively gravel should constitute a "mineral" reserved to the United States under the SRHA. If gravel were deemed to be part of the surface estate of lands patented under the SRHA, gravel deposits on SRHA lands obviously would not have been locatable, whereas gravel deposits on other lands would have been locatable. There is no indication that Congress intended the mineral reservation in the SRHA to be narrower in scope than the mining laws.

Supra at 2938-2939.

The final argument relied on by the Court reflects the general rule that land grants are construed in favor of the government, and that the extent of the grant made is only that which is expressly stated, i.e., that everything that is not specifically granted is reserved to the U.S. *Supra* at 4671. Thus, in view of the congressional intent behind the SRHA, this rule would provide further support that gravel is to be included in the mineral reservation under the Act.

The direct application of *Western Nuclear* to the case at bar is clear, as well as its effect in negating the rule in *Trujillo, supra.* First, the Commissioner has considered

sand and gravel to be a mineral dating back to N.M. Laws 1912, Ch. 82, § 42, and currently codified as § 19-8-12 NMSA 1978. These statutory provisions have been the basis for the issuance of sand and gravel leases throughout the history of the State Land Office. In *Rickelton, supra,* this statutory history is clearly set out in the dissenting opinion of Chief Justice McManus.

As pointed in that dissent, the legislature did not make clear exactly what was to be included as a mineral under Section 19-8-15 NMSA 1978, but at the same time it did not choose to restrict the meaning of the word, although it could have done so. In this same light, under § 19-8-14 NMSA 1978, the legislature specifically intended to include gravel as an excluded mineral covered by this statutory section. Moreover, at page 483 of Chief Justice McManus's opinion, he states as follows:

> Section 7-9-15 NMSA 1953 (Repl. 1974) [now codified as 19-8-12 NMSA 1978] confers on the Commissioner the power to lease public lands for "the mining, extraction or disposition of shale, clay or other natural deposits in or upon, or products of state lands. . ." From the stipulated facts and the whole record it is clear that the sand and gravel in question were "natural deposits of the land, and that they were recoverable only by mining. The terms of the mineral reservation specifically reserve to the state the right to "prospect for, mine, produce" the reserved minerals. It follows then that those deposits which can only be removed by mining production must be part of and included in the mineral reservation . . .

The reasoning used by this opinion is directly applicable to the case at bar, since the statutory section clearly reflects the intent of the legislature to bring sand and gravel within the scope of the mineral reservation. Moreover, the fact that the legislature provided for the leasing of sand

and gravel as a mineral is entirely consistent with the mandate of Section 870. It would be inconsistent with this intent and statutory interpretation, however, to conclude that the state could lease for sand and gravel as a mineral, and yet not have them included within the scope of the mineral reservation in the state patent.

In addition, the Congressional intent with regard to Section 870 is clear in terms of the purpose of granting these mineral lands to the state so as to provide support for the particular beneficiary institution. This, in conjunction with the overall intent of the state's Enabling Act, further shows that the state would not only be generating revenue from the leasing of the surface estate but from the mineral estate as well. Just as with the interpretation given the SRHA, it would be totally contrary to the Congressional intent if sand and gravel were not deemed to be reserved to the state.

Finally, the three primary considerations set out by the Court in *Western Nuclear, supra,* that the gravel be inorganic, that it can be removed from the soil and that it can be used for commercial purposes, are all established. By admission of the plaintiff's own geologist, all three of these factors have been met. (See deposition of Robert H. Crest, pages 29-30, which is attached as Exhibit H and incorporated herein.)

In conclusion, the arguments and reasoning set forth in *Western Nuclear,* as well as the legislative authority for the leasing of sand and gravel, are controlling in the case at bar. For these reasons, the Motion for Summary Judgment should be granted.

Respectfully submitted,
/s/ BILL R. GARCIA

BILL R. GARCIA

Attorney for Defendant

Jim Baca, Commissioner of Public Lands
P.O. Box 1148
Sante Fe, New Mexico 87504-1148
(505) 827-5713

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing pleading was mailed to opposing counsel of record this 25th day of August 1983.

Bill R. Garcia

APPENDIX F

IN THE SUPREME COURT OF NEW MEXICO

No. 15263
(DC No. CV-82-8)

DAVID ROE and SHEILA ROE;
BUENA VIDA, INC., a corporation;
and UNITED CONTINENTAL NEW MEXICO,
INC., a corporation,
Plaintiffs-Appellants,

v.

STATE OF NEX MEXICO, ex rel.
STATE HIGHWAY DEPARTMENT OF THE
STATE OF NEW MEXICO; JIM BACA,
Commissioner of Public Lands
of New Mexico; and KENT NOWLIN
CONSTRUCTION COMPANY, a corporation
Defendants-Appellees.

Appeal from the District Court of Chaves County
The Honorable William J. Schnedar
District Judge

APPELLEE'S (COMMISSIONER OF PUBLIC LANDS) ANSWER BRIEF

POINT III

THE MINERAL RESERVATION MANDATED BY 43 U.S.C. SECTIONS 870-871 (1977) REQUIRED IN SALES OF NUMBERED SCHOOL SECTIONS IN PLACE IS APPLICABLE TO THE LAND CLAIMED BY THE PLAINTIFFS.

The plaintiffs argue in pages eleven through sixteen of their Brief in Chief that the mineral reservation to the states in sales of state lands required by 43 U.S.C. Sections 870-871 (1977) (commonly known as the Jones Act) is not applicable to the land they claim because their land is not located in one of the numbered school sections to which the Jones Act applies. The plaintiffs neglect to mention, however, that the state patent on which their title depends conveyed portions of numbered school sections as well as the lands to which the appellants now hold title. Because of the conveyance of numbered school sections in the patent to the plaintiffs' predecessor in interest, the defendant commissioner was required by the Jones Act to insert in the patent a mineral reservation to the State.

A. The Jones Act, 43 U.S.C. §§ 870-871 (1977) Requires a Mineral Reservation to the State in Any Conveyance of Numbered School Sections That Were Granted to the State by the New Mexico Enabling Act, Stat. 557, ch. 310 (1910).

By means of the New Mexico Enabling Act, the federal government granted to New Mexico three major categories of lands -- numbered school sections, indemnity lands, and quantity grants. The Enabling Act granted or confirmed to the State a total of four sections in each township for the support of the common schools -- sections two, sixteen, thirty-two, and thirty six. New Mexico Enabling Act §6. These sections are often referred to as the numbered school

sections. The Jones Act applies only to the numbered school sections and not to the indemnity lands or the quantity grants. 43 U.S.C. § 871 (1977). In any conveyance by a state of numbered school sections, however, federal law requires the "reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same." 43 U.S.C. § 870(b) (1977). The land held by the plaintiffs that is the subject of this dispute was patented by the state to Glaze M. Sacra by State patent No. 2863 on August 5, 1964. State Patent No. 2863 conveyed portions of numbered school sections as well as the land claimed by the plaintiffs (Tr. R.P., p. 35).

B. The Reservation of Minerals to the State Contained in State Patent No. 2863 was Mandated by the Jones Act and Applies to All the Land Conveyed by the Patent, Whether or Not Those Lands are from Numbered School Sections.

The plaintiffs contend that because the land they claim is not from a numbered school section, the provisions of the Jones Act are ineffective to mandate a mineral reservation to the state in the state's patent of the land. It is the position of the defendant Commissioner that in state patents which include lands from numbered school sections, the Jones Act requires the insertion of a mineral reservation to the state. If such were not the case, the federal statute's mandate could be easily avoided by including in every conveyance of numbered school sections a portion of indemnity lands or lands from the quantity grants. The failure to insert a mineral reservation to the state in a patent of numbered school sections could result in a forfeiture of the lands to the United States. 43 U.S.C. § 870(b) (1977).

The fact that the plaintiffs' land is not from a numbered school section does not allow them to escape the application of the Jones Act to the patent by which their land

was conveyed. The plaintiffs' title traces to a state patent in which the mineral reservation to the state was required by federal law.

The mineral reservation in State Patent No. 2863 was required by the Jones Act, a federal statute, and its construction is, therefore, a question of federal law. The mineral reservation in State Patent No. 2863 applies to the lands of the plaintiffs in exactly the same manner as it applies to the numbered school sections included in the patent. The mineral reservation's effect on the plaintiffs' lands is, therefore, governed by federal case law construing similar mineral reservations.

POINT IV

WATT. v. WESTERN NUCLEAR SUPPORTS THE TRIAL COURT'S DETERMINATION THAT GRAVEL IS A RESERVED MINERAL UNDER A PATENT FOR STATE TRUST LANDS WHICH RESERVES "ALL MINERALS OF WHATSOEVER KIND."

The United States Supreme Court's decision in *Watt v. Western Nuclear,* 103 S.Ct. 2218 (1983), that gravel is included in a mineral reservation to the United States in patents under the Stock Raising Homestead Act (SRHA) was persuasive to the trial court as an interpretation of a similar federal mineral reservation such as that required by the Jones Act in a state patent of numbered school sections (Tr. P., p. 154). The similarities between the legislative histories of the SRHA, the Jones Act, and the long-standing administrative and leasing policy of the Commissioner also provide further support for the conclusion that the intent behind both Acts was to encourage the concurrent development of the surface and subsurface estates in order to maximize the financial return from the state trust lands. In addition, the trial court recognized

that *Western Nuclear* had overruled the decision in *State of New Mexico ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971) and, therefore, the case law in New Mexico that relied on *Trujillo* for the exclusion of sand and gravel as minerals reserved to the state was now questionable (Tr. P. pp. 154 and 158).

A. Watt v. Western Nuclear Holds That Gravel is Included in Mineral Reservations Reserving to the United States "All Coal and Other Minerals" in Patents Issued Under the SRHA.

As in *Trujillo*, the issue presented to the United States Supreme Court in *Western Nuclear* focused on the interpretation of the mineral reservation in the SRHA which required the reservation of "all coal and other minerals" to the United States. The determination by the Court that gravel was a mineral under the mineral reservation required by the SRHA, which is directly contrary to the result reached in *Trujillo*, is premised on the purposes of the SRHA. The Court reasoned that the mineral reservation required by the SRHA was designed to promote the concurrent development of the surface and subsurface estates of the land granted. It was clearly the expectation of Congress that SRHA surface lands would be used for stock raising and cultivation of crops. This intent itself was clear from the title of the Act as well as the limitation of lands involved to those which were "chiefly valuable for grazing and raising forage crops." *Watt v. Western Nuclear, Inc.*, 103 S.Ct. 2218, 2228 (1983). Based on the intended use of the surface estate, the court stated as follows:

> Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for com-

mercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. See 1 American Law of Mining, *supra*, at § 326. ("A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value.") . . . This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent devlopment of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value. Whatever the precise scope of the mineral reservation may be, we are convinced that it includes gravel. Like other minerals, gravel is inorganic. . . .

103 S.Ct. at 2228-2229.

Based on this same reasoning, the mineral reservation to the state in conveyances of state trust land as required by Section 870 is also designed to encourage the full development of both the mineral and surface estates of the land in order to derive a greater benefit to the public schools of New Mexico. It allows the state to lease the minerals in the land and collect the royalties and it also prevents the mineral resources from "falling into the hands of third parties, thereby insuring the proper return and full measure of support to the particular institution to which the lands were granted." H.R. Rep. No. 1761, 69th Cong., 2nd Sess., p. 4 (1926).

CONCLUSION

The trial court's granting of summary judgment under Rule 56 of the Rules of Civil Procedure was proper since the only issue before the court was purely a question of law--the interpretation of the state's mineral reservation. The construction of this reservation was determined by the New Mexico Supreme Court in *Burris* to include gravel when the documents before the Court unambiguously indicated that it was the intent of the parties that gravel be included in the mineral reservation to the state. The same factual situation presented in *Burris* is present in the case at bar.

In addition, the plaintiffs' land is subject to the mineral reservation in the state patent from which their title derives and federal case law holds that such a mineral reservation, required by a federal grant, includes gravel.

For the foregoing reasons, it is respectfully submitted that the trial court's granting of summary judgment was in accordance with law and it is respectfully requested that this Court affirm such judgment.

/s/ BILL R. GARCIA

BILL R. GARCIA
Assistant Attorney General
Commissioner of Public Lands
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5713

APPENDIX G

IN THE SUPREME COURT OF NEW MEXICO

No. 15263
(DC No. CV-82-8)

DAVID ROE and SHEILA ROE;
BUENA VIDA, INC., a corporation;
and UNITED CONTINENTAL NEW MEXICO,
INC., a corporation,
Plaintiffs-Appellants,

v.

STATE OF NEW MEXICO, ex rel.
STATE HIGHWAY DEPARTMENT OF THE
STATE OF NEW MEXICO; JIM BACA,
Commissioner of Public Lands
of New Mexico; and KENT NOWLIN
CONSTRUCTION COMPANY, a corporation
Defendants-Appellees.

MOTION FOR REHEARING

Defendant-Appellee, Jim Baca, Commissioner of Public Lands for the State of New Mexico ("the Commissioner"), pursuant to Rule 19 of the Rules of Appellate Procedure, moves that a rehearing be granted in this matter in order to reconsider the following points of law and fact that have been overlooked and misapprehended:

1. The Court is correct, as previously acknowledged by the Commissioner, that the land upon which the gravel pit in question is located is not a numbered school section but rather is an indemnity selection, and consequently was not covered by 43 U.S.C. Section 870 (1982). (Answer Brief, p. 17.) Yet, the Court has overlooked the fact that the

patent upon which the plaintiff's title depends, includes numbered school sections as well as the indemnity selections held by the plaintiffs. (Transcript of the Record, p. 35.) Since this conveyance on state trust land included numbered school sections, the state was required by Section 870 to include the mineral reservation in the patent. It is this mineral reservation that must be interpreted based on federal law. Nevertheless, as a result of the Court's opinion, the interpretation and scope of the mineral reservation has now been split in two and made to depend upon what kind of lands are involved. Federal law will apply for numbered school sections and state law will apply for indemnity or in-lieu selection lands, even if they are all included in the same conveyance and governed by the same specific mineral reservation. This bifurcation in the interpretation of state mineral reservations will lead to harsh and inequitable consequences for the state as well as inconsistent interpretations of the scope of coverage of the reservation. Such as:

(a) As is apparent in the case at bar, state law and federal law may be in conflict. Thus, what are minerals on a numbered school section, allowing the state to collect royalties on mining are non-minerals on indemnity lands that passed with the sale of the surface estate. The dilemma now created in the management and leasing of state mineral lands is that thousands of acres of indemnity lands lie adjacent to numbered school sections and a mere section line will determine whether the state owns a particular resource or not, despite the fact that the state has treated these lands the same.

(b) Since the opinion states that indemnity or in lieu selection lands are not covered by Section 870, then conceivably the state will be subject to collateral attack that these lands are not covered by any mineral reservation at all. This potential likelihood will again create the clouding of title that Section 870 had intended to correct for common school sections.

2. The Court has misapprehended the fact and point of law that the critical and decisive issue presented to the Court was the interpretation of the mineral reservation, and since the mineral reservation present in the patent was required by Section 870 its construction is therefore a question of federal law. Consequently, the construction of similar mineral reservations such as that required by the Stock Raising Homestead Act of 1916, as construed in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) and in this Court's recent decision in *Champlin Petroleum Co. v. Lyman*, 24 SBB 1199 (1985), should apply.

3. The Court has stated in its opinion that the application to purchase state lands is nothing more than a request to purchase and does not affect title to the property. This conclusion may be correct in a purely private lands sales transaction; yet this cannot be the case in the sale of state land. What the Court has overlooked and misapprehended is the critical fact that the application to purchase is required by state law (Sections 19-7-1 and 19-7-2 NMSA, 1978) which must be executed under oath, and because it is required by state law, it represents one of the requisite documents in the chain of title along with the purchase contract and patent. The application, as set forth in *Burris v. State, ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (1975), represents the intent of the parties and defines the scope of the mineral reservation in the purchase contract and patent. Therefore, as concluded in *Burris*, and applicable to the case at bar, the documents demonstrate the unambiguous intent to reserve gravel as a mineral.

4. The Court has disregarded the fact that at the time of the issuance of the sand and gravel lease to the State Highway Department, the Commissioner relied on the existing case law, *Burris*, as further basis of its claim of ownership to these mineral deposits. As reflected in the Answer Brief at pages 9 through 14, the factual situation in the case at bar is identical to that in *Burris*. Yet, does

the Court's overruling of *Burris* result in a retrospective effect, and thus, expose the state to astronomical liability for not only past royalities collected from prior leases, but tort and conversion damages as well? Based on the current language of the opinion, the state is indeed exposed to this potential liability despite the fact that the status of the law since 1975, *Burris*, verified the state's ownership of this resource.

5. The Court has stated in its opinion that the interpretation of the mineral reservation is controlled not only by New Mexico case law, but also by the New Mexico Constitution, the Enabling Act and Statutes. Yet, the Court has overlooked the fact that these laws and statutes provide further support for the claim that gravel is a reserved mineral. This is based on the following points of law and fact previously addressed in the Commissioner's briefs:

(a) Section 10 of the Enabling Act, a federal law, requires that any disposition of any "product of the land" be appraised at true value. Yet, the record is clear in the present case that the gravel, a product of the land, was not appraised in the disposition of the surface estate. Consequently, there could have been no valid sale without an appraisal. (Answer Brief, pp. 3-14) Nevertheless, the Court concludes in its opinion that the gravel passed in the sale of the surface. If this is the case, the terms and requirements of the Enabling Act have been totally abrogated and rendered meaningless.

(b) Section 19-7-25 NMSA 1978, provides that minerals shall be reserved to the state and shall be leased in the manner provided by statute. Section 19-8-12 NMSA 1978, provides for the leasing of gravel deposits. Both statutes were enacted in 1912. Since the gravel leasing policy and the authority to reserve minerals are concurrent, it is totally consistent to conclude that the mineral reservation in state patents should be construed on the basis of this *state law,* as including gravel. It would be inconsistent, on

the other hand, to regard gravel as a reserved mineral on some state lands but not on others because of the concurrent policy of reserving minerals and the leasing of gravel as a mineral. (Answer Brief, p. 32.)

(c) Article XIII, Section 2 of the New Mexico Constitution confers upon the Commissioner the duty of care and management over state trust lands. The Commissioner must exercise this authority in conformity with the requirements of the Enabling Act and the trust created therein. This Court, in its opinion has overlooked the fact that if the state had not intended to reserve the minerals, including gravel, the Commissioner would be in breach of his fiduciary duty to the trust. Therefore, if the Court is correct that the interpretation of the mineral reservation is controlled in part by the state constitution, then the Court can only conclude that the Commissioner was complying with his fiduciary duty and intending that gravel be reserved as a mineral. Otherwise, the effect of the state constitution on this particular mineral reservation will be that the lands were sold at a fraction of the cost the lands' minerals were capable of generating. (Answer Brief, p. 32.)

Respectfully submitted,

/s/ BILL R. GARCIA

BILL R. GARCIA
Special Assistant Attorney General
Attorney for Jim Baca
Commissioner of Public Lands for
the State of New Mexico
P.O. Box 1148
Santa Fe, NM 87504-1148
(505) 827-5713

APPENDIX H

The Jones Act, Act of Jan. 25, 1927, ch. 57, §§1-2, 44 Stat. 1026, provides:

CHAP. 57.--An Act Confirming in States and Territories title to lands granted by the United States in the aid of common or public schools.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral section under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid

of the common or public shcools: *Provided,* That any lands or minerals disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) That any lands included within the limits of existing reservations of or by the United States, or specifically reserved for waterpower purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such application, claim, or right is relinquished or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

SEC. 2. That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and this Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect.

APPENDIX I

43 U.S.C. 870-871 (1982), as currently in force, provides:

§ 870. Grants of land in aid of common or public schools; extension to those mineral in character; effect of leases

Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) The grant of numbered mineral sections under this section shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided,* That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney Gen-

eral for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d) of this section, any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this section.

(d)(1)Notwithstanding subsection (c) of this section, the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this section and section 871 of this title.

(2) Any such numbered school section which has been surveyed prior to July 11, 1956, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after July 11, 1956, and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded

from the provisions of this section by subsection (c) of this section for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this section and section 871 of this title, in accordance with section 871a of this title. Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, "lease" includes "permit" and "lessor" includes "grantor".

§ 871. Certain grants and laws unaffected

Nothing contained in section 870 of this title is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and said section shall not apply to indemnity or lieu selections or exchanges or the right after January 25, 1927, to select indemnity for numbered school sections in place lost to the State under the provisions of said section or any Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are continued in full force and effect.

APPENDIX J

Section 9 of the Stock-Raising Homestead Act of 1916, 43 U.S.C. 299 (1982), provides:

§299. Reservation of coal and mineral rights

All entries made and patents issued under the provisions of this subchapter shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this subchapter, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon

the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the officer designated by the Secretary of the Interior of the local land office of the district wherein the land is situate, subject to appeal to the Secretary of the Interior or such officer as he may designate: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this subchapter with reference to the disposition, occupancy, and use of the land as permitted to an entryman under the subchapter.

Supreme Court, U.S.
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No. 85-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIM BACA, COMMISSIONER OF PUBLIC LANDS OF THE STATE OF NEW MEXICO, *et al.*,
Petitioners,

v.

DAVID ROE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES F. MALONE *
R. TRACY SPROULS
ATWOOD, MALONE, MANN & TURNER, P.A.
P.O. Drawer 700
Sunwest Centre
Roswell, New Mexico 88202
(505) 622-6221

KEITH A. JONES
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under New Mexico law, the reservation of an interest in "minerals" in a conveyance of real property operates to reserve an interest in sand and gravel.*

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* The corporate respondents, United Continental New Mexico, Inc., and Buena Vida, Inc., have no parent companies or subsidiaries and are affiliated through common ownership only with each other.

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STATEMENT

This case involves a dispute over the meaning of the terms of an agreement pursuant to which the State of New Mexico sold certain real property in 1964. "The purchase contract . . . stated that 'the minerals therein shall be and are reserved,' and the patent reserved 'to the State of New Mexico all minerals of whatsoever kind.' " Pet. App. 3a. Neither document defined the term "minerals," however.

In 1981, a disagreement arose between the State and David and Sheila Roe (the present landowners and the

successors in interest to the original purchaser from the State) concerning the right to remove gravel. The State Commissioner of Public Lands, claiming that the State's reserved interest in "minerals" embraced sand and gravel, issued a sand and gravel lease to the State Highway Department. In turn, the Highway Department authorized a private contractor, Kent Nowlin Construction Company, to enter upon the land and remove gravel. "[A] total of approximately 174,000 cubic yards of processed gravel was expected to be removed." Pet. App. 3a. The Roes thereupon brought this suit for inverse condemnation, seeking damages for removal of the gravel.

The Fifth Judicial District Court, Chaves County, held that the State owned the gravel. The district judge did not write an opinion but at the summary judgment hearing indicated that he believed the land in question to be subject to the restrictions imposed by the Jones Act of 1927, 43 U.S.C. Section 870. *See* Pet. App. 12a. That statute provides that if a state sells numbered section common school lands without reserving an interest in "coal and other minerals," the lands "shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General . . . ." 43 U.S.C. Section 870(b). The district court evidently concluded that it was necessary to interpret the term "minerals" in the conveyancing instruments as covering sand and gravel in order to avoid the risk of forfeiture under the Jones Act.

The Supreme Court of New Mexico reversed. The court began by noting that the land at issue here is not in fact subject to the restrictions imposed by the Jones Act. "By its express terms, [43 U.S.C.] Section 870 applies only to the specific sections of land granted to the states for support of public schools, and does not apply to land which has been 'granted to and/or selected by and certified or approved as indemnity or in lieu of'

school land." Pet. App. 5a. In addition, 43 U.S.C. Section 871 expressly states that section 870 "shall not apply to indemnity or lieu selections." *Id.* Because the land at issue here "was selected by the State *in lieu of*, or as indemnity for, common school land," Pet. App. 7a (emphasis in original), the land "is therefore not subject to the provisions of Section 870." *Id.* Having thus determined on factual grounds that the property was not subject to the restrictions imposed by the Jones Act, the court proceeded to apply the usual rule of construction under state law: "the cases in New Mexico are in agreement that sand and gravel are not included within the scope of a general mineral reservation contained in a contract of sale or patent." Pet. App. 8a.

ARGUMENT

1. *The state court judgment below was based upon an adequate and independent state ground.* The petitioners suggest that this case presents the question whether the phrase "coal and other minerals" in the Jones Act should be construed *in pari materia* with the same phrase in the Stock-Raising Homestead Act of 1916, 43 U.S.C. Section 299. Pet. 9-10. Because the latter statute was construed to cover gravel in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), the petitioners contend that the Jones Act must be similarly construed. Pet. 10-12, 14-19. But this case does not involve a question under the Jones Act or any other federal statute. It presents no issue of federal law.

The petitioners rightly concede that, as a factual matter, the Roes' land is "not . . . governed by the Jones Act." Pet. 19. *See also id.* at 7. Consequently, the court below had no occasion to decide, and did not decide, the meaning of the phrase "coal and other minerals" in the Jones Act. The question which the court actually decided involved only the meaning of the word "minerals" as a matter of state conveyancing law—a

question that, as the court below correctly observed, is "not one of federal law, but solely of state law." Pet. App. 8a.

This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). The decision below does not adjudicate any disputed federal rights. Nor does it call into question the validity of any state or federal statute. It merely adjudicates the parties' rights under local conveyancing law. Accordingly, the case lies outside this Court's jurisdiction under 28 U.S.C. Section 1257(3).

Moreover, even putting aside the problem of jurisdiction, the issue of state conveyancing law decided below obviously does not warrant review by this Court. It is purely a matter of local concern, and the state court simply followed its own well-established precedents. *See Jensen v. State Highway Commission*, 97 N.M. 630, 642 P.2d 1089, *cert. denied*, 459 U.S. 838 (1982); *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978).

2. *The petitioners' concerns about forfeiture under the Jones Act are speculative and premature.* The petitioners are worried that the court below may apply the same rule of state conveyancing law in future cases involving land subject to the Jones Act, with the result that such land may become liable to forfeiture to the United States. Pet. 12-14, 19-21. These worries are speculative and premature. All indications suggest that, when the state court does address issues involving land subject to the Jones Act, it will protect the State against forfeiture. Indeed, the court in this case predicated its application of the usual state rule of construction upon the absence of "any federal prohibition of, or limitation on the State's right to sell or otherwise convey such lieu lands . . . ." Pet. App. 8a.

The state court already has shown its willingness to follow applicable federal law. In a decision announced five weeks prior to the decision in the instant case, the court acknowledged that, in light of this Court's decision in *Western Nuclear*, the usual state rule of construction is not applicable in cases involving land governed by the Stock-Raising Homestead Act. *Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 708 P.2d 319 (1985), *overruling State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971). *See* Pet. App. 8a-9a. The court can be expected to recognize a similar exception to the state rule for land subject to the Jones Act.

Finally, even if in some future case involving property subject to the restrictions of the Jones Act the state court were to hold that the State's reservation of an interest in "minerals" did not embrace sand and gravel, that holding standing alone would not involve a federal issue. It would simply adjudicate the respective rights of the State and the landowner under state law. The separate and distinct federal question that the petitioners mistakenly try to raise here—whether failure to reserve an interest in gravel constitutes a basis for forfeiture under the Jones Act—would not be squarely presented unless and until the United States, in a still later case, sought such forfeiture.[1]

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[1] The situation was different in *Western Nuclear*. The land patent in question there had been issued not by a State but by the United States, subject to a congressional reservation to the United States of an interest in "coal and other minerals." Consequently, in that case the scope of the land patent and the meaning of the federal statute necessarily were one and the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES F. MALONE *
R. TRACY SPROULS
ATWOOD, MALONE, MANN
& TURNER, P.A.
P.O. Drawer 700
Sunwest Centre
Roswell, New Mexico 88202
(505) 622-6221

KEITH A. JONES
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record